



RELEASE TIME

**CAN THE LEGISLATURE ADOPT A RESOLUTION GRANTING
AN INDIVIDUAL PAID RELEASE TIME FOR UNION ACTIVITIES?**

September 4, 2018

THE COUNTY IS GETTING FULLY REIMBURSED BY CSEA FOR ALL PAYMENTS MADE FOR RELEASE TIME

- ▶ The Resolution demands, and CSEA has agreed, that it will pay all County costs, including health insurance and all pension contributions, so this will cost the county nothing.
- ▶ CSEA has had similar long-term arrangements with municipal employers for the six regional CSEA presidents, including New York State, three other counties (Herkimer, Fulton and Monroe), and the Farmingdale School District.
- ▶ The paid release time agreements throughout the state are usually not the product of a specific CBA agreement; rather separate agreements are drafted.

SUMMARY OF COUNTY ATTORNEY'S ARGUMENTS

- I. A paid leave of absence is a gift of public funds in violation of the NYS Constitution.
- II. The Legislature does not have the power to grant paid leaves of absence as done here.
- III. The Doctrine of Separation of Powers prevents the Legislature from “directing” the day-to-day activities of the administration or giving specific directions to employees of the executive branch of government.
- IV. A paid leave of absence appears to violate Civil Service Law.
- V. Absent a contract between CSEA and the County, the payments are a gift.

SUMMARY OF RESPONSES TO COUNTY ATTORNEY'S ARGUMENTS

- I. Based on extensive legal research and cases in Federal, State, and NY courts, paid release does not violate the NYS Constitution's gift clause and is a widespread and widely accepted practice.
- II. Based on General Municipal Law § 92 and County Law § 207, the Legislature possesses the sole authority to grant a leave of absences such as release time, paid or unpaid.
- III. There is no "Separation of Powers" issue since the law gives the Legislature the power to grant release time and direct the appropriate department or commissioner to carry out its policy directives.

SUMMARY OF RESPONSES TO COUNTY ATTORNEY'S ARGUMENTS

- IV.** The Resolution does not violate Civil Service Law since:
 - A.** The employee was still on release time when the CBA expired in 2016, so the status quo should continue until a new contract is negotiated; and
 - B.** To the extent that there was a change to the expired CBA, both the union and the policy-making legislature agree to the change.
- V.** The resolution demands that CSEA reimburse the county; if that means a contract must be signed, the appropriate executive department will create one that includes reimbursement.

I. PAID RELEASE DOES NOT VIOLATE THE “GIFTS AND LOANS” CLAUSE OF THE NYS CONSTITUTION

A. Other states have upheld release time against constitutional “gift clause” challenges

- 1) New Jersey - “Similar release time provisions have also been held to withstand constitutional challenge under other state’s constitutional gift clause provisions.”
- 2) Arizona – “ We hold the release time provisions at issue here do not violate the Gift Clause.”
- 3) Idaho – quoting the Arizona case, the court agreed that “[i]t is not unusual for collective bargaining agreements to include provisions requiring employers to pay certain employees for time spent on union activities.”
- 4) Texas – lawsuit to stop the practice of “release time” as an “unconstitutional gifting of taxpayer money to a political union” dismissed.

I. PAID RELEASE DOES NOT VIOLATE THE “GIFTS AND LOANS” CLAUSE OF THE NYS CONSTITUTION

B. Paid release is a widespread practice in New York, as evidenced by New York cases in both state and federal courts:

- 1)** NY Appellate Division cases discuss whether an employee who is on paid release time can be disciplined.
- 2)** Second Circuit cases arising out of New York discuss issues relating to employee activities while on paid release time from a union. There are no issues raised with respect to constitutionality of release time, despite virtually identical fact pattern in one case (“For the next six years ... Hoyt remained on full-time leave pursuant to the above agreement, which was periodically renewed”).
- 3)** Federal district court cases have fact patterns that include release time, with no constitutional challenges.

II. THE LEGISLATURE POSSESSES THE SOLE AUTHORITY TO GRANT RELEASE TIME

- A. General Municipal Law § 92 and County Law § 207 give the Legislature the authority to grant leaves of absence, paid or unpaid.
- B. New York Appellate Division cases mandates that this Legislature approve all leave time, specifically mentioning the GML and County Law provisions.
- C. The cases the County Attorney cites to support the position that the Legislature cannot grant paid release time do not apply because they do not have similar facts.
 - 1) Coates – GML § 92 does not permit cash payments upon retirement for unused time because the CBA did not contain any such provision
 - 2) Teachers Assoc. – Court rejected challenge that paying unpaid sick leave (a provision in the CBA) was an unconstitutional gift because GML § 92 did not authorize this payment.

II. THE LEGISLATURE POSSESSES THE SOLE AUTHORITY TO GRANT RELEASE TIME

- D.** The 1960 Comptroller opinion stating that a Town must grant paid sick leave uniformly to all employees does not apply here
- 1)** Obviously, release time cannot be given to all employees, or there would be no workers.
 - 2)** The Legislature's authority to grant paid leave does not only come from G.M.L. § 92, but also from County Law § 207. The Opinion does not discuss the County law because it is responding to a Town inquiry and, according to the Opinion, the G.M.L. provision is "the sole authority for the allowance of paid sick leave on the part of the town..."
 - 3)** The 1960 opinion was written before the case law discussed previously, and case law controls over Agency opinions.

III. THERE IS NO “SEPARATION OF POWERS” ISSUE

The Law Gives the Legislature the Power to Grant Release Time and Direct the Appropriate Department to Carry Out its Policy Directives

- A.** As noted previously, statutory and case law give the Legislature the authority to grant paid release time.
- B.** While a County Charter can supersede some NYS laws, the only GML §92 power given to the County Executive in our Charter is the power to authorize sick leave extensions. Other statutory powers – including paid leaves of absence – remain with the Legislature.
- C.** Rockland County Civil Service Rule XIX, which gives the appointing authority/officer to grant “leave of absence without pay” has nothing to do with the statutory authority giving the Legislature the power to grant paid release time.

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The Law Gives the Legislature the Power to Grant Release Time and Direct the Appropriate Department to Carry Out its Policy Directives

D. The Legislature may, in a legally adopted resolution, direct employees of the Executive Branch to carry out its policy considerations.

1) Oneida v. Berle – “[T]he executive branch may not override enactments which have emerged from the lawmaking process. It is required to implement policy declarations of the Legislature, unless vetoed or judicially invalidated. ...A failure to fulfill this obligation violates the unequivocal command of the Constitution -- it is not subject to academic debate concerning the proper division of governmental powers.”

2) There are numerous NY Court of Appeals and Appellate Division cases that uphold state legislation “directing” commissioners and departments to carry out Legislative instructions. No reason Rockland should be different.

III. THERE IS NO “SEPARATION OF POWERS” ISSUE

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- 3) The County Attorney himself has used such language in resolutions that he has drafted – “the Rockland County Commissioner of Finance shall disburse, in accordance with this resolution...”**
- 4) Merely directing employees of the executive branch of government to carry out otherwise lawful policy dictates from the Legislature does not violate or in any way implicate the Separation of Powers doctrine.**
- 5) Neither the County Executive nor his employees may thwart the Legislature’s policy decisions once adopted.**

IV. THE RESOLUTION DOES NOT VIOLATE CIVIL SERVICE LAW

The County Attorney's opinion suggests that Civil Service Law § 209-a forbids the County from changing any term in an expired contract. That is not quite the law, however.

As applicable, Civil Service Law § 209-a states as follows:

1. Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately ... (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article...

IV. THE RESOLUTION DOES NOT VIOLATE CIVIL SERVICE LAW

- A.** The employee was still on release time when the CBA expired in 2016, so the status quo should continue until a new contract is negotiated, as it should be frozen in place.
- 1)** According to the NY Court of Appeals, this section of the Civil Service Law was put into place to maintain the “status quo.”
 - 2)** The employee in question was on release time when the CBA in question expired in 2016, so Civil Service Law § 209-a(1)(e) therefore serves to freeze the release time at the moment the CBA expired. Allowing the employee to continue to receive what he had when the contract expired is the best way to live up to the law and Public Employee Review Board (“PERB”) interpretations.
 - 3)** It makes no sense to fail to come to terms on a new contract for so long, then claim the contract provision that could well have been renegotiated in that time is now dead due to this failure.

IV. THE RESOLUTION DOES NOT VIOLATE CIVIL SERVICE LAW

B. To the extent that there was a change to the expired CBA, both the union and the policy-making legislature agree to the change.

- 1)** It is patently obvious that parties may agree to do something that is not covered in a separate agreement between the parties.
- 2)** If a contract provision expires, there is nothing to prevent the parties to the contract to mutually agree to continue the provision.
- 3)** The Legislature is legally empowered to make this policy choice, subject to veto and override.

V. THE RESOLUTION DIRECTS THE PERSONNEL DEPARTMENT TO EFFECTUATE ITS INTENT, WHICH INCLUDES A CONTRACT

- A.** As noted previously, the Legislature has the authority to direct County Commissioners to implement policy.
- B.** The resolution states “that the Commissioner of Personnel is hereby authorized to issue a Paid Leave of Absence...” contingent upon conditions.
- C.** Obviously, in order to do so, there must be a contract drafted and signed between the County and CSEA memorializing the contractual obligations. It is not necessary for the Legislature to dictate each step necessary to accomplish its policy determinations.

CONCLUSION

- ▶ The Legislature was and is authorized to offer paid release time via this Resolution.
- ▶ There are no legal impediments to this resolution, as far as I can tell.
- ▶ I will therefore be voting to override the County Executive's veto. I hope that those who voted for it in a bipartisan manner just a few weeks ago will do the same.